From: Louis B. Moore
To: Microsoft ATR
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Subject: Microsoft Settlement

19575 East 128th Ave
Commerce City, CO 80022
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Renata B. Hesse

Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

Via Electronic Mail and USPS.

To whom it may concern,

We are writing with regard to the proposed settlement of the Civil Action No. 98-1232 The United States of America v. Microsoft Corporation which was published in the Federal Register on 28 November 2001 in accord with the provisions of the Tunney Act and pursuant to the Court's order of 08 November 2001.

In considering the proposed remedy in the above referenced case we take as our starting point the summary in the Department of Justice COMPETITIVE IMPACT STATEMENT:

> The Court of Appeals upheld the conclusion that Microsoft had engaged in a variety of exclusionary acts designed to protect its operating system monopoly from the threat posed by a type of platform software known as "middleware," in violation of Section 2 of the Sherman Act. Specifically, the Court determined that, in response to the middleware threat, Microsoft:
>
> (1) undertook a variety of restrictions on personal computer Original Equipment Manufacturers ("OEMs"); (2) integrated its Web browser into Windows in a non-removable way while excluding rivals; (3) engaged in restrictive and exclusionary dealings with Internet Access Providers, Independent Software Vendors and Apple Computer; and (4) attempted to mislead and threaten software developers in order to contain and subvert Java middleware technologies that threatened Microsoft's operating system monopoly.

It is probable in this case that some form of structural remedy would have been the most effective in curbing the monopolistic abuses while avoiding the expected difficulties involved with governmental regulation. Microsoft has worked itself to the level of a utility not unlike the AT&T of the late 1970s. An economic power of this scale ultimately has to be regulated or structurally altered in order to prevent continuing harm of the types found by the District and Appeals Courts. It is a surprise, therefore, that the DoJ chose to remove the structural remedy from the negotiating table so early in the process.

We have examined the proposed settlement in an attempt to judge its effectiveness, both in redressing the harm the Defendant has caused and in preventing further harm by action of the Defendant. We have likewise examined the provisions proposed by the nine states (California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, West Virginia and Utah) in their alternative settlement. If the process requires choice of one of these two proposed settlements, then we respectfully suggest that the nine states' proposal be the one selected, as it appears to offer a better chance of correcting the harms found to have been caused by Microsoft's Sherman Act violation by the District Court and unanimously affirmed by the Appeals Court.

Detailed information concerning this preference will doubtless be submitted by others, so we will describe only two examples to illustrate the reasons for preferring either the nine-state alternative or structural remedies in this case.

(1) Section VI. U.

The District and Appeals court found that Microsoft had "integrated its Web browser into Windows in a non-removable way while excluding rivals". The proposed settlement contains various rules concerning "Middleware" and some definitions:

> Section VI. J "Microsoft Middleware" means software code that 1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;
>
> Section VI. U. ... The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

This would appear to introduce a large degree of ambiguity. For

example:

1. The definitions ultimately lead to the Defendant's defining what is and what is not the "Windows Operating System Product".
2. As long as the Defendant defines what consitutes the "Windows Operating System Product," ISVs will never be sure if they are competing with Windows or with a Middleware product.
3. Consumers will never know the true cost of the Microsoft products they are purchasing, as long as the price is hidden in the cost of the system as a whole and they are uncertain as to what is or is not part of the "Windows Operating System Product".

Under the nine-states proposal Microsoft would offer an unbundled version of Windows, as well as the usual product. This would help to define what constitutes the Operating System and what contitutes a bundled or "integrated" product.

(2) Section III.J.2

The public is best served when communications protocols and APIs adhere to common, publicly available, and documented standards such as the Internet Engineering Task Force Requests For Comment. Considerable effort has been made by researchers, hobbyists and 501(c)3 not-for-profits towards such public interoperable standards.

> J. No provision of this Final Judgment shall:...
>
> 2. Prevent Microsoft from conditioning any license of any API, Documentation or Communications Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product to any person or entity on the requirement that the licensee: (a) has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by

> Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

Among the problems that stand out in this section:

1. The defendant will have a conflict of interest in that it will be certifying the authenticity and viability of entities attempting to compete with the defendant.
2. The provision sets up several barriers to many of the 501(c)3s, academcians, researchers and hobbyists that helped build, and continue to help maintain, the Internet in the first place.

A far better approach would be for the defendant to adhere to published standards from appropriate independent bodies than for the defendant to pick and choose who may compete with it.

In conclusion, we do not see how the remedy proposed by the DoJ and Microsoft will address the the harms found by the District Court and affirmed by the Appeals Court.

Respectfully submitted,

/Signed/

Johanna S. Billmyer

/Signed/

Louis B. Moore

CC: Louis Moore,J Billmyer